

FEDERAL CIRCUIT COURT OF AUSTRALIA

SHARMA & ORS v MINISTER FOR IMMIGRATION & ANOR [2013] FCCA 1280

Catchwords:

MIGRATION – Review of decision by Migration Review Tribunal – refusal of a Skilled (Residence) (Class VB) visa – whether Migration Review Tribunal’s decision affected by jurisdictional error – application for leave to amend application – whether Migration Review Tribunal misconstrued or misapplied public interest criterion 4020 – whether Migration Review Tribunal misconstrued and misapplied “no evidence” – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.97, 359A, 359AA

Migration Regulations 1994 (Cth), cl.886.223, 886.224, 886.225

Federal Circuit Court of Australia 1999 (Cth), s.88F

Cases cited:

Blatch v Archer (1774) 1 Cowp. 64; 98 ER 969

Bushell v Minister for Immigration and Citizenship & Anor [2008] FMCA 1193

Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135

Sandhu v Minister for Immigration [2013] FCCA 491

SZBYR v Minister for Immigration & Anor (2007) 81 ALJR 1190

Talukder v Minister for Immigration [2009] FMCA 223; [2009] FCA 916

First Applicant: SHERRY SHARMA

Second Applicant: RAJMINDER SINGH PANNU

Third Applicant: AVINOOR PANNU

First Respondent: MINISTER FOR IMMIGRATION,
MULTICULTURAL AFFAIRS &
CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG 3021 of 2012

Judgment of: Judge Manousaridis

Hearing date: 2 August 2013
Date of Last Submission: 2 August 2013
Delivered at: Sydney
Delivered on: 6 September 2013

REPRESENTATION

Counsel for the Applicant: Mr Afshar
Solicitors for the Applicant: Christopher Levingston & Associates
Counsel for the Respondents: Mr Smith
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The application for leave to amend the amended application is dismissed.
- (2) Subject to orders 4 and 5, the amended application is dismissed.
- (3) The applicants pay the first respondent's costs fixed in the amount of \$5,400.
- (4) Pursuant to s.88F of the *Federal Circuit Court of Australia Act 1999* (Cth), up and until 13 September 2013 these reasons for judgment not be disclosed other than to:
 - (a) the parties and their external legal representatives; and
 - (b) the Court.
- (5) There be liberty to apply on two days' notice to the Court for:
 - (a) the extension of the order referred to in paragraph 4; or
 - (b) the making of any other order under s.88F of the *Federal Circuit Court of Australia Act 1999* (Cth).

- (6) The name of the first respondent recorded in the application be amended to “Minister for Immigration, Multicultural Affairs and Citizenship”.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3021 of 2012

SHERRY SHARMA

First Applicant

RAJMINDER SINGH PANNU

Second Applicant

AVINOOR PANNU

Third Applicant

And

**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS
& CITIZENSHIP**

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. In this application for judicial review, the applicants claim that, when reviewing a decision of a delegate of the first respondent (**Minister**) refusing to grant to the first applicant a Skilled (Residence) (Class VB) visa, the second respondent (**Tribunal**) misconstrued and misapplied

paragraph 1 of “*public interest criterion 4020*” (**PIC4020**). That paragraph provides:

2. There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for a visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

3. In particular, the applicants claim the Tribunal misconstrued the word “*evidence*” as it appears in PIC4020. They submit that the word “*evidence*” has the meaning explained by Driver FM (as his Honour then was) in *Talukder v Minister for Immigration*;¹ and that the Tribunal misapplied this word by finding there was evidence that the applicants had given a bogus document to the Minister when, on the applicants’ submissions, there was no “*evidence*” to support such finding.
4. In addition, the applicants seek leave to amend the application to contend that the Tribunal failed to accord the applicants procedural fairness. The applicants wish to claim that the Tribunal based its decision on information which the Tribunal was bound by s.359AA of the *Migration Act 1958* (Cth) (**Act**) to provide to the applicants, but which the Tribunal failed to provide to the applicants.
5. To properly understand and consider the applicants’ claims, it will be necessary to first set out the facts which led to the applicants applying to the Tribunal for a review of the delegate’s decision, the evidence and submissions the applicants presented to the Tribunal, and the Tribunal’s reasons for deciding to affirm the delegate’s decision.

6. Background

¹ [2009] FMCA 223

7. On 29 October 2008 the first applicant (**applicant**) applied to the Minister for a Skilled (Residence) (Class VB) (**skilled visa**). In order to qualify for a skilled visa, the applicant had to satisfy the Minister of the criteria specified in subclass 886 of Schedule 2 to the *Migration Regulations 1994* (**Regulations**).² Two criteria are relevant to these proceedings.
8. The first is that the “*skills of the applicant have been assessed by the relevant assessing authority as suitable for the applicant’s nominated skilled occupation*”.³ The skills the applicant nominated in her application for the skilled visa, and which she had to demonstrate had been assessed by a “relevant assessing authority”, was that of a “pastry chef”. The relevant assessing authority for this skill is the Trades Recognition Authority (**TRA**).
9. The second criterion the applicant had to satisfy was that contained in clause 886.224 of Schedule 2 to the Regulations which required the Minister to be satisfied, among other things, that “*no evidence has become available since the time of application [for a visa] that the information given or used . . . to obtain the skills assessment . . . was false or misleading in a material particular*”. By the time the matter came before the Tribunal, clause 886.224 had been repealed and replaced by clause 886.225(a) of schedule 2 to the Regulations which now requires that an applicant for a skilled visa satisfy PIC4020. The expression “*public interest criterion*” is defined in reg.1.03 of the Regulations to mean a “*criterion set out in a clause of Part 1 of Schedule 4*” to the Regulations, and “*a reference to a public interest criterion by number is a reference to the criterion set out in the clause so numbered in that Part*”. PIC4020 is a public interest criterion referred to in schedule 4 by reference to the number 4020.
10. Before 6 February 2008, the applicant applied to the TRA for a positive skills assessment. In support of that application, the applicant’s migration agent submitted to the TRA a letter from a business known as “Axilleon” (**Axilleon Cakes**) addressed to “*To whom it may*

² This and the other classes of visa specified in schedule 2 to the Regulations are prescribed under reg.2.03 of the Regulations pursuant to s.31(3) of the Act.

³ Cl.886.223(1).

concern” (**Axilleon reference letter**).⁴ The opening paragraph of that letter states:⁵

11. This is to certify that Sherry Sharma (D.O.B 3/01/1983) was working at Axilleon Cake Shop from 15/11/06 till 30/11/07. Over this period of time she contributed to our business more than 900 hours of unpaid work.

12. The application to the TRA resulted in the TRA granting to the applicant a positive skills assessment. This occurred on 6 February 2008. The applicant relied on the TRA’s assessment in her application for the skilled visa.⁶
13. By letter dated 1 July 2010,⁷ a delegate of the Minister (**Delegate**) informed the applicant that results of an investigation by the Department of Immigration and Citizenship (**DIAC**) “*indicate that some of the information provided with your application may be false and misleading*”. The information the Delegate said may be false and misleading was information the applicant provided to the Department of Education, Employment and Workplace Relation “*to obtain a positive Skills Assessment*”. The Delegate also stated that “*information from a number of sources has indicated that documentation you relied on to support your application was fraudulently obtained*”. There is no issue that the “documentation” the Delegate intended to assert had been fraudulently obtained was the Axilleon reference letter.
14. The Delegate informed the applicant she was not satisfied the applicant met the requirements of clause 886.224 of the Regulations, and invited the applicant “*to comment or provide any further information in relation to*” the “*revocation of the skills assessment result*” or the applicant’s “*ability to satisfy the relevant visa criteria*”. The applicant provided a response in a letter dated 24 July 2010. In that letter, the applicant set out details of the nature and extent of her work with Axilleon Cakes.⁸

⁴ The Axilleon reference letter is at CB107. The MRT found the Axilleon reference letter was sent to the TRA by the applicant’s migration agent (CB223 [60]). This is presumably based on the evidence the applicant gave before the MRT – see pp17-18 of the transcript which is annexed to the affidavit of Da Wei David Gu affirmed on 10 April 2013.

⁵ CB107

⁶ CB13

⁷ CB128

⁸ CB147

15. On 3 August 2010 the Delegate refused to grant the applicant a skilled visa⁹. The Delegate stated:

16. An investigation was conducted by this department in relation to work references provided from Axilleon Cakes and adverse information was discovered. The result of the investigation indicates that the work reference letter that you provided to Trades Recognition Australia (TRA) to obtain a positive skills assessment was fraudulently obtained.

17. The Delegate acknowledged the applicant's letter dated 10 July 2010, and accepted that the applicant may have had contact with the business owner of Axilleon Cakes and the employees, and that the applicant may have performed some work at Axilleon Cakes. The Delegate noted, however, three reasons for not accepting the applicant's claims that she performed 900 hours' work with Axilleon Cakes. The Delegate concluded as follows:

18. In summary, the result [of] the investigation conducted by the department indicates that you did not complete 900 hours of work at Axilleon Cakes as a pastry Cook as claimed in the work reference letter provided to TRA. In my assessment you have failed to provide sufficient evidence that would reassure me that I can find your employment claims to be adequately substantiated.

19. Information received by Tribunal before the hearing

20. On 19 August 2010 the applicants applied to the Tribunal for a review of the Delegate's decision. By letter dated 20 August 2012 the Tribunal invited the applicants to appear before it on 12 September 2012.¹⁰
21. On 10 September 2012, an officer from the Tribunal made enquiries by email of DIAC about an investigation DIAC had carried out concerning Axilleon Cakes issuing reference letters. The Tribunal identified the investigations about which it enquired by reference to a named individual. There is currently in place a non-publication order issued by the County Court of Victoria on 30 November 2010 in relation to this individual.

⁹ CB155

¹⁰ CB178

22. The parties have proposed a form of order under s.88F of the *Federal Circuit Court Act 1999* (Cth) which, if made, will prevent disclosure (other than to the parties or to the Court) of the emails that passed between the Tribunal and DIAC about the investigations DIAC made,¹¹ of the affidavit made by Christopher Hugh Levingston made on 14 June 2013, and of paragraphs 50, 51 and 52 of the applicants' written submissions.
23. In my opinion, the proposed disclosure order is too broad. The scope of any non-publication order should go no further than is reasonably necessary to preserve the efficacy of the non-disclosure order made by the County Court of Victoria. In my opinion, but subject to hearing further submissions from the parties, that would be achieved by making an order that is limited to preventing the disclosure of the person's identity. In any event, I have prepared these reasons without identifying the name of the individual.
24. The results of the inquiry the Tribunal made of DIAC are set out in the Tribunal's reasons for decision.¹² The Tribunal noted it had requested further details from DIAC about the applicant's case, and that on 10 September 2012 the Tribunal had received a response from an investigator within DIAC. The investigator stated she had checked the applicant's work references. The investigator further said that the seized work references header contained a different applicant's name but in the body referred to "*Sherry SHARMA*", and it contained Axilleon's address, ABN, business number, business phone number and mobile number along with Tina Galanos' name. The investigator noted, however, that "*the content and the format were different to the work reference submitted to TRA*".
25. In addition, before the hearing, the applicants, through their migration agent, provided to the Tribunal a number of documents. These included two work references, one dated 3 November 2007 and the other 10 September 2012, from a business known as Pastry Art Design stating that the applicant had undertaken 918 hours' worth of voluntary work during 12 March 2007 to October 2007.

26. Evidence given by applicants to the Tribunal

¹¹ These being the emails contained at pages 180 to 186 of the Court Book

¹²CB221 [42]

27. According to the Tribunal's reasons for decision, the applicant gave evidence to the Tribunal which included the following: the applicant worked as a volunteer for two bakeries, not one, in order to increase her skills and learn more;¹³ she left Pastry Art Design because her husband had moved to Bendigo for his job and the applicant asked that she be paid for her work, but Pastry Art Design refused;¹⁴ the applicant described the work she said she did while at Axilleon Cakes;¹⁵ she did not sign time sheets or any other documents while she worked at Axilleon Cakes because she was not asked;¹⁶ it was for her own records and future work options that the applicant needed a work experience letter verifying over 900 hours' work experience at Pastry Art Design, even though she had worked over 900 hours at Axilleon Cakes;¹⁷ the applicant asked Ms Galanos for the letter after she completed the 900 hours;¹⁸ the applicant knew she had worked 900 hours because she knew when she started, and Ms Galanos knew the hours the applicant worked because she hired the applicant;¹⁹ the applicant first realised there was a problem with her claimed work experience with Axilleon Cakes when she received an email from her case officer at DIAC;²⁰ the applicant went to Ms Galanos after she received the email from DIAC to ask her about it but, apart from telling the applicant DIAC had telephoned Ms Galanos, and Ms Galanos had told DIAC the applicant had worked at Axilleon Cakes, Ms Galanos said she would not provide any more letters.²¹
28. During the hearing the Tribunal informed the applicant the Tribunal had requested further details from DIAC about the applicant's case, and that the Tribunal had received a response from an investigator within DIAC. Although what was said about this is summarised in the Tribunal's reasons for decision,²² it would be useful to set out what the transcript shows was said:

¹³ CB220 [29]

¹⁴ CB220 [20]

¹⁵ CB220 [32]

¹⁶ CB220 [34]

¹⁷ CB220 [36]

¹⁸ CB220 [38]

¹⁹ CB220 [38]

²⁰ CB221 [39]

²¹ CB221 [40]

²² CB221 [42]-[44]

29. **Tribunal Member:** *So what I got back from the investigations team was that they checked your work reference letter. . . . [T]hey seized over 200 work reference letters as part of the investigations. The header, apparently, contained a different applicant's name, but your name was referred to in the body of the letter and this work reference letter contained Axilleon's address, their ABN, business number, business phone number, mobile number and Tina Galanos' name. However, they also said, the department, that the content and format were different to the work reference letter you submitted to TRA. . . . Also as part of their searches they've found - they've had major concerns with Axilleon Cakes. . . . [27] And the developments about the consequences are that it could indicate that there is evidence that you provided false and misleading information or a bogus document to TRA for your skills assessment, ie, the work reference letter from Axilleon and if so, that would be the reason or part of the reason for . . . affirming the original decision. . . .*

30. **Applicant:** *I don't understand the way you say it like from the department the letter had all this and that. I don't understand what you mean to say.*

31. **Migration Agent:** *Ma'am, this is a general sort of conclusion that they found the name and they are linking this . . . what is happening with Axilleon. She has worked there. As she told, she has worked there generally and I know - I'm aware that Axilleon has provided letters to so many other people who have not worked there and it could be possible that she is getting affected by those - all those things.*

32. Thus, at the hearing, the Tribunal informed the applicant the substance of the information DIAC provided to the Tribunal about DIAC's investigations concerning the issuing of bogus work reference letters by Axilleon, and of the fact that the applicant's name was found in a document which also contained the name of another person. The applicants, through their migration agent, appeared to accept that "Axilleon has provided letters to so many other people who have not worked". Their submission was in effect that that fact should not lead

the Tribunal to disbelieve the applicant's claim that she worked the 900 hours as certified in the letter from Axilleon.

33. Tribunal's decision and reasoning

34. There is no issue between the parties that at the time the Tribunal reviewed the Delegate's decision, the relevant criteria of which the Tribunal had to be satisfied were those contained in PIC4020, not those contained in clause 886.224 which the Delegate considered.
35. The issue the Tribunal identified it was required to determine was whether there was "*evidence that the applicant has given or caused to be given to the Minister, an officer, the [Tribunal], a relevant assessing authority or a Medical Officer of the Commonwealth . . . a bogus document or information that is false or misleading in a material particular in relation to the application for the visa*".²³
36. The Tribunal first discussed the notion of "*no evidence*". After noting the expression "*is not defined in the legislation*", and referring to the decisions of the Federal Magistrates Court (as this Court was then known) in *Bushell v Minister for Immigration and Citizenship & Anor*²⁴ and *Talukder v Minister for Immigration*,²⁵ the Tribunal said that its task was to "*make an assessment as to whether there is evidence that is sufficiently probative to lead to a conclusion that the information given was a bogus document or false or misleading in a material particular*".²⁶ The Tribunal concluded there was such evidence.
37. The Tribunal said it had a number of "*concerns about the authenticity of the applicant's work reference from Axilleon Cakes*". First, there was the information relating to DIAC's investigation into work references from Axilleon Cakes, as set out in the Delegate's decision of 3 August 2012 and in the information DIAC provided to the Tribunal. The Tribunal noted that, although this information "*is not conclusive evidence that the applicant did not work at Axilleon Cakes for the period of time worked, when combined with other concerns*" to which the Tribunal refers in its reasons, the information from DIAC "*does raise genuine concerns about the authenticity of the applicant's*

²³CB222 [57]

²⁴[2008] FMCA 1193 (Scarlett FM)

²⁵ [2009] FMCA 223

²⁶CB223 [58]

claimed work experience".²⁷ Second, the Tribunal found some of the applicant's evidence about her work at Axilleon Cakes to be "*vague and at times inconsistent*". Third, the Tribunal found nothing in the applicant's account of her work at Axilleon to persuade it that the applicant worked for over 900 hours at Axilleon Cakes. Fourth, the Tribunal was concerned Ms Galanos, the signatory of the Axilleon letter, was unwilling to give evidence, or even to acknowledge knowing the applicant.²⁸

38. On the basis of these concerns, the Tribunal:

39. (a) was not satisfied the applicant undertook over 900 hours volunteer work experience at Axilleon Cakes in the claimed period;²⁹

40. (b) concluded it reasonably suspected the applicant's positive skills assessment from TRA was obtained because of a false or misleading statement to TRA that the applicant had completed over 900 hours of directly related work experience;³⁰

41. (c) the applicant's positive skills assessment from TRA is a "bogus document" within the meaning of s.97(c) of the *Migration Act 1958 (Cth) (Act)*.³¹

42. The Tribunal's overall conclusion was:³²

43. The Tribunal therefore finds that there is evidence before it that the applicant has given to a relevant assessing authority a bogus document in relation to the application for the visa that is the subject of this review, so the applicant does not meet this requirement of PIC 4020(1)(a).

44. Counsel for both the applicants and the Minister suggested the Tribunal was incorrect to conclude in this paragraph that the "*bogus document*" was given to the relevant assessing authority, namely, TRA. That is so because, both counsel suggested, the relevant "bogus document" was

²⁷CB223 [62]

²⁸CB224 [65]

²⁹CB224 [54] (sic)

³⁰CB224 [54] (sic)

³¹CB224 [54] (sic)

³²CB224 [55] (sic)

not the Axilleon reference letter, but the positive skills assessment from the TRA. Both counsel seemed to agree that this must be so having regard to the definition of “bogus document” contained in s.97(c) of the Act which provides that the expression “*bogus document*”, in relation to a person, means:³³

45. a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or*
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.*

46. The Axilleon reference letter does not fall within any of these three categories. The TRA positive skills assessment, however, does because, assuming the Axilleon reference letter contained false or misleading information, and the TRA relied on it in making the positive skills assessment, the TRA positive skills assessment was obtained because of false or misleading statements.

47. I agree with counsel for the parties that nothing turns on this error. As I set out earlier in these reasons, the Tribunal found that the positive skills assessment from the TRA was obtained because of a false or misleading statement, and that, for that reason, it was the positive skills assessment from the TRA that was the “bogus document”. In all probability, by stating there was evidence that a bogus document was given to a relevant authority the Tribunal intended to state there was evidence that a bogus document was given to the Minister.

48. Did the Tribunal misconstrue the meaning of “evidence”?

³³Reg.1.03 of the Regulations provides that “bogus document” has the same meaning as in s.97 of the Act.

49. I now turn to the first issue raised in this application, namely, whether the Tribunal misconstrued and misapplied the word “evidence” as that word appears in PIC4020.

50. *Preliminary matters*

51. There are a number of matters I should address before I consider the applicants’ submissions.

52. First, both parties submitted that the decision in *Talukder v Minister for Immigration*³⁴ is relevant to the exposition of the proper construction of the word “evidence” as it appears in PIC4020, even though *Talukder* was concerned with clause 886.224 of Schedule 2 to the Regulations which has been repealed, and which contains different words. I accept that submission.

53. Second, although both parties submitted *Talukder* is relevant to this application for judicial review, the applicants emphasised the reasoning of Driver FM (as his Honour then was) whereas the Minister submitted that it is what Edmonds J said in the appeal from the decision of Driver FM that I must follow. That, of course, is correct. Edmonds J said:³⁵

54. In my view, the word ‘evidence’ is used, in contradistinction to the word ‘information’, which is also used in the clause, to impose a requirement that, whatever facts are conveyed by the material relied upon to establish that the information given to meet the requirements of item 1128CA(3) (k) of Schedule 1 was false or misleading in a material particular, are sufficiently probative to lead to that conclusion.

55. Applying this passage to PIC4020, “evidence” is used in PIC4020 to impose a requirement that whatever facts are conveyed by the material relied upon to establish that information given in connection with the application for a skilled visa was false or misleading in a material particular, they must be facts that are sufficiently probative to lead to that conclusion. Stated more simply, “evidence”, as that word appears in PIC4020, means material that is sufficiently probative to lead to the conclusion that information given in connection with the application for a skilled visa was false or misleading in a material particular.

³⁴ [2009] FMCA 223 (Driver FM); on appeal [2009] FCA 916 (Edmonds J)

³⁵ At [20]

56. Applying this construction of PIC4020 to the circumstances of this case, the Tribunal's task when reviewing the Delegate's decision was to consider whether there was material before it that was sufficiently probative to lead to the conclusion that the Axilleon reference letter contained a statement that was false or misleading in a material particular. If the Tribunal concluded there was such material, it could not conclude that PIC4020 was satisfied. If, on the other hand, it could not conclude there was any such material, the Tribunal would conclude PIC4020 has been satisfied.
57. The third matter to note is that the applicants do not submit the Tribunal expressly applied an incorrect construction of the word "evidence". That submission was not available to them because the Tribunal correctly identified the task it was required to undertake. As I set out earlier in these reasons, the Tribunal said that its task was to "*make an assessment as to whether there is evidence that is sufficiently probative to lead to a conclusion that the information given was a bogus document or false or misleading in a material particular*".³⁶ The applicants instead submit the Tribunal applied the incorrect construction not by what it said, but by what it did. That is, the applicants submit that the Tribunal's applying an incorrect construction of "evidence" is to be inferred from the fact that the material on which the Tribunal relied for concluding there was "evidence" was not in fact "evidence". The applicants seek to make good that submission by identifying and making submissions about the material on which the Tribunal relied for concluding there was evidence pointing to the Axilleon reference letter containing information that was false or misleading.
58. In my opinion, if the applicants' submissions are read literally, they may be taken to be inviting the Court to undertake the very task the Tribunal was required to undertake, namely, to determine whether there was "evidence" that was sufficiently probative to lead to the conclusion that the Axilleon reference letter contained a statement that was false or misleading in a material particular. That can be seen from the form of the applicants' ultimate submission, namely, that "*the information that formed the basis of the Tribunal's decision does not constitute*

³⁶CB223 [58]

“evidence”.”³⁷ Whether or not such information constituted “evidence”, however, was a matter for the Tribunal’s, not the Court’s, satisfaction. Of course, as the applicants themselves submit,³⁸ the Tribunal’s satisfaction must be one “*formed reasonably upon the material before the decisions-maker*”.³⁹ This means that the question whether the Tribunal committed jurisdictional error by the manner in which it approached the question whether there was “evidence” must be approached by asking whether the Tribunal’s satisfaction that there was “evidence” was one that was “*formed reasonably upon the material before the*” Tribunal.

59. Given the applicants themselves submit that courts are required to assess the nature of the materials before the decision-maker to determine whether the decision was open based on those materials,⁴⁰ I will treat the applicants as submitting that it was not open to the Tribunal to conclude that any of the materials on which it relied was “evidence” within the meaning of PIC4020.

60. *The applicants’ submission on the Tribunal’s findings in paragraph 62 of its reasons for decision*

61. The Tribunal said it placed “*some weight on the information relating to the Department’s investigation into work references from Axilleon Cakes*”.⁴¹ The applicants submit that this information does not constitute “evidence”. That is so because the information DIAC provided to the Tribunal was vague and was made without any proper basis; the reference of the applicant’s name in a seized document was not probative of any wrongdoing by the applicant; and the differences between the Axilleon reference letter and the letter seized by the DIAC pointed to the Axilleon reference letter not being connected with the letters that had been seized.⁴² Further, counsel for the applicants submitted that the DIAC information did not have the qualities of the information Judge Driver in *Sandhu v Minister for Immigration*⁴³ found entitled the Tribunal to conclude there was “evidence”.

³⁷ Applicants’ written submissions, [46]

³⁸ Applicants’ written submissions, [18]

³⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 150

⁴⁰ Applicants’ written submissions, [18]

⁴¹ CB223 [62]

⁴² Applicants’ written submissions, [40]

⁴³ [2013] FCCA 491

62. The applicants' submission overlooks one important piece of information to which the Tribunal refers in paragraph 62 of its reasons for decision. That information is that Axilleon Cakes "*provided letters to many others who did not actually work there*".⁴⁴ This is not information DIAC simply provided to the Tribunal. It was a fact accepted by the applicants through their migration agent. As I set out earlier in these reasons, at the hearing before the Tribunal, the applicants' migration agent said he was "*aware that Axilleon has provided letters to so many other people who have not worked there*".
63. In my opinion, it was reasonably open to the Tribunal to regard this fact, together with the other information DIAC provided to it, as constituting material that was sufficiently probative to lead to the conclusion that the Axilleon reference letter contained a statement that was false or misleading in a material particular. That is so because, from the fact that a particular entity, Axilleon, provided letters to "*so many people*" falsely stating that people had worked at Axilleon, it could reasonably be inferred that a particular letter (the Axilleon reference letter) stating that a particular person (the applicant) had worked at Axilleon was also false. It was certainly "evidence" such as to make it reasonable for the Tribunal not to conclude there was "*no evidence before the Minister that the applicant has given, or caused to be given, to the Minister . . . a bogus document or information that is false or misleading in a material particular*".
64. *The applicants' submission on the Tribunal's findings in paragraph 63 of its reasons for decision*
65. In paragraph 63 of its reasons for decision, the Tribunal said it found the applicant's evidence about her work at Axilleon Cakes to be vague and at times inconsistent, and set out the matters on which the Tribunal relied for so finding.
66. The Tribunal identified two inconsistencies. One was the applicant's stating in her letter dated 24 July 2010 to DIAC⁴⁵ that she had learnt to make biscuits from "Diance" and the applicant's not mentioning the name "Diance" during the hearing. In particular, the applicant did not give the name "Diance" when she responded to the Tribunal's question:

⁴⁴CB223 [62]

⁴⁵CB147 at 148

“Who mainly taught you?”. The applicant answered: *“It was Costa”*.⁴⁶ The second inconsistency was between the applicant stating in her letter dated 10 July 2010 to DIAC that she had worked at Axilleon Cakes from 15 November 2006 to 30 November 2007 and *“did not indulge in any work elsewhere”*, but before the Tribunal stating she had worked at Pastry Art Design from March to October 2007.

67. The applicants submit that the information the Tribunal identified in paragraph 63 of its reasons for decision was of little relevance to prove, in an objective and rational manner, whether or not the applicant supplied a bogus document.⁴⁷ In my opinion, this submission overlooks the potential relevance of the Tribunal finding that the applicant’s evidence was inconsistent and vague. It was open to the Tribunal to consider these findings as being relevant to the credibility of the applicant’s evidence. That, in turn, was potentially relevant to the weight the Tribunal could reasonably give to the information it received from DIAC, including the fact that Axilleon Cakes *“provided letters to many others who did not actually work there”*.⁴⁸ That is so because the statements contained in the Axilleon reference letter related to matters about which the applicant could give first-hand knowledge; and the less credibility it was open to the Tribunal to accord to applicant’s testimony about those matters, the more weight it was open to the Tribunal to give to the information it received from DIAC.

68. Counsel noted that one of the Tribunal’s findings in paragraph 63 of its reasons for decision was not supported by the transcript, that finding being that the applicant said that an old lady worked at Axilleon Cakes, but she could not remember her name. The transcript records the following:⁴⁹

69. **Tribunal Member:** *So when you were doing that volunteer work end of 2006 to end of 2007, was it largely Tina and Costa who worked in the shop?*

70. **Applicant:** *Yes, and one of the – and one of the old lady was there. I call her....*

⁴⁶T11.35

⁴⁷Applicants’ written submissions, [43]

⁴⁸CB223 [62]

⁴⁹T11.4

71. **Migration Agent:** *And any volunteer workers like you, students?*

72. It is not possible to say what accounts for the four stops after the applicant's words "*I call her*". The stops could simply record the applicant pausing to say nothing, in which case the Tribunal would have been justified in saying the applicant could not remember the name of the old lady. Another possibility is that the applicant was interrupted.
73. In my opinion, this does not affect the reasonableness of the Tribunal's conclusion that the applicant's evidence about her work at Axilleon was at times inconsistent. Nor does it affect the Tribunal's finding that the applicant's evidence was vague. It cannot be inferred that the Tribunal's finding in that regard was based only on the Tribunal's noting that the applicant could not remember the name of the old lady. The Tribunal prefaced its reference to this and other matters with the words "*for instance*".
74. *The applicants' submission on the Tribunal's findings in paragraph 64 of its reasons for decision*
75. In paragraph 64 of its reasons the Tribunal found there was nothing in the applicant's account of her work, or any material before the Tribunal to be so persuasive that she worked for over 900 hours as a volunteer during the period she claimed. The applicants submit that PIC4020 did not require the applicant to persuade the Tribunal she performed the requisite 900 hours of work experience.⁵⁰
76. In my opinion, this submission misunderstands the potential relevance of the finding, which must be assessed in the context of the Tribunal's having regarded as probative the information it received from DIAC. The Tribunal's informing the applicant of the information it received from DIAC called for a response from the applicant to provide credible information which it was open to the Tribunal to find was within the applicant's power to provide, or which the applicant would be expected to provide, to rebut or explain away the inference it was reasonably open to the Tribunal to draw on the basis of the information it received from DIAC. A finding that the applicant failed to provide such

⁵⁰Applicants' written submissions, [41]

information entitled the Tribunal to give greater weight to the DIAC information.⁵¹

77. *The applicants' submission on the Tribunal's findings in paragraph 65 of its reasons for decision*

78. The applicants submit that the unwillingness of Ms Galanos, the person who signed the Axilleon reference letter, to give evidence or to acknowledge she knew the applicant was not relevant. I disagree.

79. In my opinion, it was reasonably open to the Tribunal to find that Ms Galanos was unwilling to give any further evidence and had lately been denying knowledge of the applicant.⁵² It was also reasonably open to the Tribunal to further find that this unwillingness added to the Tribunal's overall concerns "*about the authenticity of the work reference and claimed work experience of over 900 hours with Axilleon Cakes*".⁵³ That is so because, from the fact that a person who purportedly signed a letter addressed to "*to whom this may concern*" is unwilling to confirm to a reader of that letter that the contents of the letter are true, it is reasonably open to infer that the person does not believe in the truth of what is contained in the letter.

80. Application to amend to include claim of breach of procedural fairness

81. I now turn to the applicants' application that it be granted leave to amend the application to include the following additional ground of review:

82. *The second respondent erred in the exercise of jurisdiction by denying the applicants procedural fairness.*

83. Particulars

84. *a. The second respondent was in possession of information that would have been the reason, or part of the reason, for the second respondent's decision to*

⁵¹ On the basis of the maxim identified by Lord Mansfield in *Blatch v Archer* (1774) 1 Cowp. 64; 98 ER 969: "*It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.*"

⁵² The evidence is at T23.50-T24.15

⁵³ CB224 [65]

affirm the decision of the delegate to refuse the applicants' visa application.

85. *b. The second respondent failed to give to the applicants clear particulars of this information.*

86. Although not stated in the proposed ground of review, the actual proposed ground the applicants seek leave to advance is that the Tribunal failed to comply with s.359A or s.359AA of the Act.
87. The information the applicants wish to contend the Tribunal considered would be the reason, or a part of the reason, for affirming the decision of the Delegate, and which it therefore ought to have disclosed to the applicants under s. 359AA of the Act, is the fact that the person whom DIAC had connected with the preparation of false reference letters had been convicted.
88. The Minister submits that the amendment should not be permitted because it lacks merit. First, the Minister submits there is nothing in the evidence before the Court to suggest the Tribunal knew of the conviction of the person concerned. In my opinion, that submission is correct. The name of the person who was convicted is mentioned in one of the emails sent to the Tribunal. But there is no reference to that person having been convicted. For this reason alone, the proposed ground, if allowed to be advanced, is bound to fail.
89. Second, the Minister submits that knowledge of the identity of this person or of the fact of his conviction was not the reason or a part of the reasons for the Tribunal's affirming the Delegate's decision. The Minister points to paragraphs 41, 42, and 43 of the Tribunal's reasons for decision which shows the information the Tribunal disclosed to the applicant expressly pursuant to s.359AA of the Act. In my opinion, that submission, too, is correct, and affords an additional ground for concluding, as I do, that the proposed ground, if allowed, is bound to fail.
90. Third, the Minister submits that, in any event, the information the applicants propose to claim the Tribunal ought to have disclosed under s.359AA of the Act was not "*information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision*

under review”. That is so because the information “*did not contain in their terms a rejection, denial or undermining of*” the applicants’ claim to a skilled visa.⁵⁴ I accept the Minister’s submission.

91. Conclusion and disposition

92. In my opinion, the Tribunal correctly construed and applied the notion of “evidence” as that term is used in PIC4020. It was reasonably open to the Tribunal to conclude, as it did, that there was material before it that was sufficiently probative to lead to the conclusion that the Axilleon reference letter contained a statement that was false or misleading in a material particular; and that it could therefore not be satisfied that the applicants satisfied PIC4020. Further, in my opinion, the applicant’s proposed claim the Tribunal failed to comply with s.359AA is bound to fail, and, for that reason, I should refuse the applicants leave to amend the amended application to permit the applicants to make that claim.

93. Accordingly, I propose to dismiss the application to amend the amended application, and to dismiss the amended application. I also propose to order that the applicants pay the Minister’s costs.

I certify that the preceding sixty-one (61) paragraphs are a true copy of the reasons for judgment of Judge Manousaridis

Associate:

Date: 6 September 2013

⁵⁴*SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at [17]